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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 562

ABE PLISCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 23–27) [1] is reported at 192 F. Supp. 337. The opinion of the court of appeals (Pet. 11–19) is reported at 306 F. 2d 784.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1962. A petition for rehearing *en banc* was denied on July 30, 1962 (Pet. 9–10). The petition for a writ of certiorari was filed on October 26, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

[1] Record references made in this manner are to the pages of the Joint Appendix which constituted the printed record in the court of appeals, now part of the record in this Court.

QUESTIONS PRESENTED

1. Whether the method employed by the Commissioner in determining tax deficiencies against the petitioners was so arbitrary as to vitiate the presumptive correctness of the determination.

2. Whether the trial court must make an estimate of allowable gambling losses in excess of those previously allowed by the Commissioner where there is no finding that any such additional losses occurred.

3. Whether the court of appeals erred in holding that records offered by the petitioners were not sufficiently credible to overcome the presumptive correctness of the Commissioner's determination.

STATEMENT

The United States brought suits against each of the taxpayers (petitioners here) in the United States District Court for the District of Columbia to reduce to judgment assessments for income taxes for the years 1948, 1949 and 1950; the three suits were consolidated for trial (R. 23). During those years the taxpayers were engaged in a gambling enterprise as partners (Pet. 11; R. 23). The assessments resulted from the disallowance by the Commissioner of certain alleged gambling losses. The alleged losses disallowed were those claimed to have resulted in a net loss from gambling on a particular day (Pet. 11). Losses were allowed to the extent of gains on a daily basis (Pet. 17).

The unpaid balances due and owing on the various assessments were established in the pretrial proceedings (R. 20–21). At the trial the United States

introduced no additional evidence and relied on the claim that these assessments created a *prima facie* case that the deficiencies were correct, though subject to rebuttal by the taxpayers (R. 32). Percy May, one of the taxpayers, and the sole defense witness, identified certain exhibits (Deft. Ex. 1, 2, 3) as being the only records of the partnership's gambling activities. He testified that he had personally maintained the records, recording for each day of the years in question one figure which was the daily net gain or loss of that day for the partnership (R. 35). He also testified that memoranda of individual gambling transactions were made, but that these records were destroyed daily to avoid incrimination (R. 42). Petitioners offered the exhibits in evidence as records made in the regular course of business (R. 43–44). Objection was made that they were not the best evidence and that they were not original entries (R. 43). After receiving briefs on the issue (R. 48), the court held that the exhibits were not admissible as business records. Since the exclusion of the exhibits left the taxpayers without evidence to rebut the *prima facie* case established by the assessments, judgment was rendered in favor of the United States for the total amount of the deficiencies (R. 27–28).

The court of appeals affirmed, one judge dissenting, holding that the manner in which the deficiencies were determined did not vitiate the presumptive correctness of the determination.[2] It held further that

[2] It was assumed by the majority and the dissent in the court of appeals (see Pet. 16–17), and the government here concedes, that the assessments were determined on the basis of the daily one-line records kept by petitioners.

the taxpayers' records, assuming they were admissible evidence, were insufficient to rebut the presumptive correctness of the deficiency determinations and that there was no error in the district court's failure to make an estimate of losses beyond those previously allowed by the Commissioner (Pet. 13–15).

ARGUMENT

The only question presented in this case concerns the inferences to be drawn from the way in which the taxpayers kept records of their gambling wins and losses. There is no conflict of decisions and the case is of no general importance.

1. The determination of the Commissioner of Internal Revenue in assessing taxes is presumptively correct, and is sufficient of itself to establish a *prima facie* case that the amount of taxes so assessed is due the United States. See *United States* v. *Rindskopf*, 105 U.S. 418. Admittedly, the presumption can be countered by a showing that the Commissioner's determination is arbitrary and excessive. Cf. *Helvering* v. *Taylor*, 293 U.S. 507. But we dispute taxpayers' contention that the manner in which the Commissioner's determination was made in this case is so lacking in rationality that it should have been rejected as arbitrary and excessive.

The taxpayers maintained a system of records which revealed only one figure as a daily result of their gambling enterprise. The figure for each day was either a net win or net loss for the day, with no indication of the gross volume of gambling transactions handled. The Commissioner used the daily net

win figures in making his assessment. He disallowed the purported net losses, computed on a daily basis.[3] The court of appeals, in holding that this factor of itself did not show the determination to be arbitrary and excessive, said (Pet. 13–14):

> We think, however, that since appellants had no incentive to overstate their daily profit figures in order to increase their taxes, the Commissioner could reasonably accept these figures as minima. On the other hand, since appellants did have an incentive to overstate their daily loss figures in order to reduce their taxes, the Commissioner could reasonably reject these figures in the absence of any data which would provide a basis for testing their reasonableness.

The taxpayers have cited no authority in conflict with this holding.[4] Cf. *Showell* v. *Commissioner* 23 T.C. 495, reversed on other grounds, 238 F. 2d 148 (C.A. 9). This action, involving an administrative determination, cannot be characterized as arbitrary particularly when the burden always rests on the taxpayer to substantiate the amount of his claimed deductions. See *Burnet* v. *Houston*, 283 U.S. 223; *Helvering* v. *Taylor, supra.*

2. The taxpayers argue that *Cohan* v. *Commissioner*, 39 F. 2d 540 (C.A. 2), required the district court

[3] The taxpayers state that the Commissioner allowed them no losses in making his determination (Pet. 6), but this is contrary to the facts accepted by the court of appeals (Pet. 11, 17).

[4] Cases such as *Dewey* v. *Hotchkiss*, 30 N.Y. 497, relied on by the taxpayers (Pet. 5) have no bearing on this issue. Those cases announce a rule of evidence and are hardly appropriate authority for judging the rationality of this administrative determination.

to make an estimate of losses in addition to those allowed by the Commissioner. That case established the principle (*id.* at 544) that where the fact-finder determined that a deductible expense had been incurred, but the taxpayer was unable to prove the amount thereof, an approximation should be made, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." Since there is no finding here that any gambling losses in excess of those allowed by the Commissioner had been sustained, no approximation was required. *Chesbro* v. *Commissioner*, 225 F. 2d 674 (C.A. 2).

3. The court of appeals assumed, without deciding, that the records proffered as evidence, but refused admission by the district court, could properly have been received.[5] Notwithstanding this assumption the

[5] The court of appeals assumed that the records could have been received as a record of the past recollection of the witness, May (Pet. 12). This ground of admissibility was not open to the taxpayers on appeal, however, since, to obviate the apparent hearsay objection, they had offered the exhibits as business records under 28 U.S.C. 1732. (The district court properly held that the business records exception did not apply, citing *Palmer* v. *Hoffman*, 318 U.S. 109 (R. 23–27).) Where proffered evidence is subject to a general exclusionary rule, the proponent must point out a proper exception and cannot put the trial court in error by pointing out a valid, but different, exception for the first time on appeal. See *Janes* v. *Janes*, 278 Fed. 576 (C.A.D.C.); *Rothwell* v. *First Nat. Bank of Boston*, 286 Mass. 417, 190 N.E. 812; *Weller* v. *Fish Transport Co.*, 123 Conn. 49, 192 Atl. 317; *Johnson* v. *Rockaway Bus Corp.*, 145 Conn. 204, 140 A. 2d 708; cf. *Smith* v. *Shoemaker*, 17 Wall. 630; *Standard Oil Co. of California* v. *Moore*, 251 F. 2d 188, 217 (C.A. 9th).

Beyond this, however, the records could not properly be received as a recorded past recollection which, like any testi-

court of appeals held that the records were not of sufficient probative value to rebut the *prima facie* case made by the assessments. The rebuttable presumption of correctness attending the Commissioner's determination is not evidence, but the *prima facie* case established by the presumption will prevail in the absence of substantial evidence to the contrary. *Cullers* v. *Commissioner,* 237 F. 2d 611 (C.A. 8). It is not overcome by inherently improbable testimony, even though that testimony be uncontradicted. *O'Laughlin* v. *Helvering,* 81 F. 2d 269 (C.A. D.C.).

The records in this case are an alleged summation of numerous memoranda that were the actual records of taxpayers' gambling transactions. Those memoranda had been systematically destroyed to avoid incrimination. The net-figure summation is devoid of any possibility of internal check and contains no information from which verification could be made by reference to other sources. Although perhaps the product of daily entry, these figures lack all the earmarks of trustworthiness that lend credibility to ordinary business records. Moreover, the district court concluded that the records in question had been maintained for the purpose of providing

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mony, is subject to the normal rules of evidence which require firsthand knowledge and the like. It was shown that the net-figure summation resulted from a daily computation of all payouts made—not just the gambling payouts. As a result, the net figure was no more than the declarant's assertion of the daily net taxable income of the partnership (Pet. 13). This, of course, is a conclusion of law to which the witness was not competent to testify by either present memory or past recollection recorded.

some documentary support for the taxpayers' dealings with the Internal Revenue Service (R. 27). The court of appeals properly held that such records were not credible enough to overcome the *prima facie* case made by the government.*

CONCLUSION

We respectfully submit that the petition for writ of certorari should be denied.

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NOVEMBER 1962.

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* The court noted that petitioners could have rebutted the presumption of validity accorded the Commissioner's assessment "by the cash expenditures or by the bank deposit method. *See generally*, 2 Mertens, Federal Income Taxation § 12.12 (1961)" (Pet. 15).

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